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Supreme Court of the United States

OCTOBER TERM, 1990

MICHAEL BARNES, Prosecuting Attorney of St. Joseph County, Indiana, *et al.*,
Petitioners,

v.

GLEN THEATRE, INC., *et al.*; and DARLENE MILLER, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF OF PEOPLE FOR THE AMERICAN WAY, THE COALITION FOR FREEDOM OF EXPRESSION, AND THE NATIONAL CAMPAIGN FOR FREEDOM OF EXPRESSION AS AMICI CURIAE IN SUPPORT OF THE RESPONDENTS

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QUESTION PRESENTED

Whether a state's ban on non-obscene nude dancing in adult-only establishments violates the First Amendment.

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INTEREST OF THE AMICI[1]

People for the American Way is a nonpartisan, education-oriented citizens' organization established to promote and protect civil and constitutional rights, including First Amendment freedoms. Founded in 1980

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[1] Counsel for both petitioners and respondents have consented to the filing of this brief. Their consents are on file with the Clerk.

by a group of religious, civic and educational leaders devoted to our nation's heritage of tolerance, pluralism and liberty, the organization now has over 290,000 members nationwide.

The Coalition for Freedom of Expression is an organization of concerned individuals, artists and arts organizations and institutions—including the American Film Institute, California Lawyers for the Arts, Independent Composer's Association, Los Angeles Philharmonic Association, Museum of Contemporary Art, Otis/Parsons Art Institute, PEN Center USA/West, UCLA Film and Television Archive and the Writers Guild of America/West —all of whom uphold and support the basic freedoms of thought, speech and expression in America.

The National Campaign for Freedom of Expression is an alliance of artists, arts organizations, and audiences formed to uphold and protect freedom of expression and to fight censorship throughout the United States.

These *amici* have filed briefs in this Court in other cases that implicate the concerns of their members for protecting such First Amendment freedoms. *See, e.g., United States v. Eichman*, 110 S. Ct. 2404 (1990). Their concern is not whether the specific activities in this case merit approval or disapproval as a matter of artistic taste. Instead, their concern is that this Court not set a precedent for the prohibition of a new category of material under the label of indecency, thus broadening the sweep of criminal statutes far beyond the obscene. The *amici* believe that this kind of prosecution would not only endanger the specific performances at issue here, but would reach protected expression generally and undermine long-standing First Amendment guarantees for much controversial or unorthodox expressive conduct that may be offensive to some members of our society.

SUMMARY OF ARGUMENT

I. The First Amendment protects non-obscene nude dancing. This Court has consistently recognized that government can prohibit speech involving sexual matters only under the standard of obscenity that this Court set forth in *Miller v. California*, 413 U.S. 15 (1973), and that a jury—not state regulators—must decide whether particular material is contrary to "contemporary community standards." Unwilling to attempt this burden, Indiana concedes that respondents' nude dancing is not obscene and seeks to ban that conduct under its public indecency statute. But Indiana cannot so easily evade this Court's *Miller* standard. This Court has firmly established that blanket bans on adult access to indecent, but not obscene, communications violate the First Amendment—even where the speech involves nudity. And, consistent with these principles, this Court has repeatedly stated that the First Amendment affords protection, in adult-only establishments, to nude dancing that is not obscene under the *Miller* test.

II. That nude dancing involves conduct, rather than spoken or written words, does not remove it from the First Amendment's protection or lessen this Court's exacting scrutiny of Indiana's law. In its recent flag-burning decisions, this Court made abundantly clear that "*conduct* may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson*, 109 S. Ct. 2533, 2539 (1989) (emphasis added); *see United States v. Eichman*, 110 S. Ct. 2404, 2407 (1990). Nude dancing plainly meets that test. Respondents' nude dancing communicates an unmistakable message—an emotive one of eroticism—that their patrons clearly understand. That this message is not political or educational—and, indeed, is offensive to some individuals—does not immunize it from First Amendment protection. Not unlike the erotic message that nude dancers have purveyed on more tradi-

tional stages throughout ancient and more modern times, respondents' conduct is communicative and entertaining. It is speech protected by the First Amendment.

III. Indiana's claim that the ban furthers governmental interests "unrelated to the suppression of free expression" is misguided. Indiana does not seek to ban nude dancing to promote interests "unrelated to the suppression of free expression" (*United States v. O'Brien*, 391 U.S. 367, 377 (1968); it seeks to prohibit nude dancing precisely because of the message of eroticism that it conveys—a message that it deems contrary to "public morality." This Court's decision in *O'Brien* is simply irrelevant here.

IV. Nor do this Court's decisions concerning state regulation of the "secondary effects" of speech provide petitioners any refuge. This case is not about the "secondary effects" of respondents' speech. Petitioners seek to prohibit respondents' performances because of Indiana's concern that erotic messages may undermine public morality, not because of concern with urban blight. This Court recently made clear that viewers' reactions to speech are not "secondary effects" that states can regulate free of First Amendment concerns. *See Boos v. Barry*, 485 U.S. 312 (1988). Indiana's law is also unconstitutional because it is not a regulation at all, but a total prohibition on respondents' speech. *See City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986).

V. For similar reasons, Indiana's regulation of respondents' conduct is not a reasonable "time, place and manner" restriction. Indiana canot justify its prohibition "without reference to the content of the regulated speech" (*Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984); indeed, the regulation is not content-neutral at all because the message of respondents' speech—eroticism—is precisely what Indiana seeks

to ban. And Indiana's restriction forecloses any adequate alternatives for communication; it simply is not an answer for Indiana citizens to leave the state to enjoy nude dancing, or be relegated to viewing more conventional forms of dance within Indiana's borders.

VI. Sustaining Indiana's ban on non-obscene nude dancing would set a dangerous precedent under the First Amendment. Petitioners, in essence, ask this Court to draw a constitutional line between non-verbal conduct that constitutes "high" art—*e.g.*, ballet—and non-verbal conduct that amounts, in Indiana's view, to "low" entertainment—*e.g.*, the nude dance involved here. But the First Amendment recognizes no such line, particularly one that turns on the amount of clothing that a performer wears. To attempt to draw such a line would ultimately place at risk much accepted, albeit unconventional, First Amendment speech.

ARGUMENT

For nearly two decades, this Court has held that sexually explicit material that is not obscene is protected by the First Amendment. Petitioners seek a radical departure from established constitutional principles, relying on their own speculation about the effects of nude dancing and on decisions of this Court that have little or no relevance to either the legislative prohibition involved or to the facts in this case. This Court should not accept petitioners' invitation to rewrite the law of obscenity. Nor should it lose sight of the significant issues of freedom of expresesion at stake merely because the performances in question may not qualify, in the views of some individuals, as high artistic achievement.

I. THIS COURT HAS HELD THAT SPEECH DEALING WITH SEXUAL MATTERS CAN ONLY BE PROHIBITED UNDER THE STANDARD OF *MILLER v. CALIFORNIA* AND THAT NUDE PERFORMANCES ARE PROTECTED SO LONG AS THEY ARE NOT OBSCENE

A. Petitioners' Approach Constitutes A Thinly-Disguised Effort To Overrule *Miller v. California*

In *Miller v. California*, 413 U.S. 15 (1973), after decades of struggle with definitional questions, this Court held that speech addressing sexual matters can be prohibited only if a state can establish (1) that " 'the average person, applying contemporary community standards' would find that the work, taken as a whole, appeals to the prurient interest," *id.* at 24 (citations omitted); (2) that "the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by the applicable state law," *id.*; and (3) that "the work, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* Petitioners here chose not to prosecute respondents for violating Indiana's statutory prohibition of obscene performances. *See* Ind. Code Ann. § 35-49-3-2 (West 1986).[2] While petitioners profess a conviction that nude dancing "is clearly devoid of artistic content" (P. Br. at 10) and "does nothing more than arouse sexual urges" (*id.* at 24), they evidently

[2] That statute makes it a crime to engage in, manage or produce any "obscene performance." *Id.* The statute defines a performance as "any play, motion picture, dance, or other exhibition or presentation, whether pictured, animated, or live, performed before an audience of one (1) or more persons." *Id.* § 35-49-1-7. It further provides that a performance is "obscene" if "(1) the average person, applying contemporary community standards, finds that the dominant theme of the matter or performance, taken as a whole, appeals to the prurient interest in sex; (2) the matter or performance depicts or describes, in a patently offensive way, sexual conduct; and (3) the matter or performance, taken as a whole, lacks serious literary, artistic, political, or scientific value." *Id.* § 35-49-2-1.

concluded that they would be unable to convince an Indiana jury that the dancing in question was contrary to "contemporary community standards" and have conceded that it was non-obscene. Pet. App. at 3. Unable to ban nude dancing under the *Miller* standard, petitioners seek to achieve the same result through Indiana's public indecency statute. This approach should not be seen as anything but a thinly-disguised effort to evade this Court's decision in *Miller*.

If the *Miller* standard cannot be satisfied, this Court has consistently held that sexual speech is protected and has rejected governmental attempts to ban supposedly "indecent" communications. In *Butler v. Michigan*, 352 U.S. 380 (1957), this Court overturned a conviction under a state statute that prohibited selling books to the general public if they had a potentially harmful effect on minors; it held that the statute impermissibly "reduce[d] the adult population of Michigan to reading only what is fit for children" and thus "arbitrarily curtail[ed] one of those liberties of the individual." *Id.* at 383-84. In *Bolger v. Youngs Drug Products Corp.*, 463 U.S. 60 (1983), the Court invalidated a blanket ban on unsolicited mailings of detailed advertisements concerning contraceptives and human sexuality, recognizing the First Amendment's protection of such speech. More recently, in *Sable Communications of California, Inc. v. FCC*, 109 S. Ct. 2829, 2836 (1989), the Court invalidated a blanket ban on "indecent" telephone communications, making clear that "[s]exual expression which is indecent but not obscene is protected by the First Amendment." Virtually every recent federal court decision of which we are aware—whether involving live theater, film, broadcasting, cable, telephone, or print —has unhesitatingly concluded that blanket bans on such "indecent" speech violate the First Amendment.[3]

[3] In addition to the Supreme Court decisions discussed, *infra*, at 8-10, *see, e.g., Wilkinson v. Jones*, 480 U.S. 926 (1987), *aff'g mem.* 800 F.2d 989 (10th Cir. 1986) (per curiam), *aff'g Com-*

B. This Court Has Recognized That Non-Obscene Nude Dancing Is Protected By The First Amendment

Even with respect to the precise issue here, the court below correctly recognized that it was "not writing on a clean slate." Pet. App. at 3. This Court has already stated, on several occasions, that the First Amendment affords protection to nude dancing. In *California v. LaRue*, 409 U.S. 109, 118 (1973), the Court concluded that a state could regulate nude dancing in establishments that serve liquor under the Twenty-First Amendment, but unanimously recognized that some nude performances "are within the limits of the constitutional protection of freedom of expression."[4] In *Doran v. Salem Inn, Inc.*, 422 U.S. 922, 932 (1975), the Court again recognized this protection. In invalidating an overbroad ordinance banning topless dancing in all public places, despite the municipality's authority to regulate under the Twenty-First Amendment, the Court stated that "[a]lthough the customary 'barroom' type of nude dancing may involve only

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munity Television of Utah, Inc. v. Wilkinson, 611 F. Supp. 1099 (D. Utah 1985) (cable); *Action for Children's Television v. FCC*, 852 F.2d 1332, 1343 n.18 (D.C. Cir. 1988) (broadcasting); *Carlin Communications, Inc. v. FCC*, 837 F.2d 546 (2d Cir.), *cert. denied*, 488 U.S. 924 (1988) (telephone); *Krueger v. City of Pensacola*, 759 F.2d 851, 854 (11th Cir. 1985) (live entertainment); *Cruz v. Ferre*, 755 F.2d 1415 (11th Cir. 1985) (cable); *American Booksellers Ass'n v. Webb*, 643 F. Supp. 1546 (N.D. Ga. 1986) (print); *Rushia v. Town of Ashburnham*, 582 F. Supp. 900 (D. Mass. 1983) (print); *Community Television of Utah, Inc. v. Roy City*, 555 F. Supp. 1164 (D. Utah 1982) (cable); *American Booksellers Ass'n v. McAuliffe*, 533 F. Supp. 50 (N.D. Ga. 1981) (print); *Home Box Office, Inc. v. Wilkinson*, 531 F. Supp. 987 (D. Utah 1982) (cable); *Tattered Cover, Inc. v. Tooley*, 696 P.2d 780 (Colo. 1985) (en banc) (print).

[4] 409 U.S. at 118; *see id.* at 121 (Douglas, J., dissenting); *id.* at 123 (Brennan, J., dissenting); *id.* at 139 (Marshall, J., dissenting); *see also New York State Liquor Authority v. Bellanca*, 452 U.S. 714, 718 (1981).

the barest minimum of protected expression, we recognized in *California v. LaRue* . . . that this form of entertainment might be entitled to First and Fourteenth Amendment protection under some circumstances." *Id.* at 932.[5]

The Court has recognized that the First Amendment protects entertainment that includes nudity in other cases involving live or filmed public performances. The Court in *Erznoznik v. City of Jacksonville*, 422 U.S. 205 (1975), invalidated an ordinance prohibiting drive-in movie theaters from exhibiting films displaying nudity, if the screen was visible from a public street. Similarly, in *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546 (1975), the Court held that a municipality's refusal to provide a stage for the rock musical *Hair* because it involved nudity and simulated sex was an unconstitutional content-based prior restraint, implicitly recognizing that the performance, if not obscene, was protected speech under the First Amendment.[6]

Most recently, this point was made explicit in *Schad v. Borough of Mount Ephraim*, 452 U.S. 61 (1981). In that case, the Court overturned the convictions of operators of adult bookstores, who offered their customers the opportunity to view live nude dancers behind a glass panel, under a zoning ordinance that prohibited all live entertainment. In so doing, the Court stated:

> Entertainment, as well as political and ideological speech, is protected. . . . Nor may an entertainment

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[5] Petitioners here do not attempt to defend their actions under the Twenty-First Amendment. Pet. at 13 ("[T]he First Amendment issue is not clouded by the applicability of the Twenty-First Amendment . . . ."). This Court, accordingly, need not decide what impact that Amendment might have on petitioners' ability to regulate the respondents' conduct in this case.

[6] *See generally Freedman v. Maryland*, 380 U.S. 51 (1965).

> program be prohibited solely because it displays the nude human figure. '[N]udity alone' does not place otherwise protected material outside the mantle of the First Amendment. . . . [N]ude dancing is not without its First Amendment protections from official regulation.

Id. at 65-66; *see id.* at 80 (Stevens, J., concurring in judgment) ("the foliage of the First Amendment may cast protective shadows over some forms of nude dancing").[7]

This Court has thus made abundantly clear that, absent proof of obscenity under *Miller*, governmental bans on speech purveying nudity contravene the First Amendment.[8] While Judge Easterbrook seeks to dismiss each of these decisions on the ground that they did not afford absolute protection to nude dancing (Pet. App. at 93-96), the possibility that some nude dancing may be obscene

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[7] Various members of this Court have, on other occasions, likewise recognized the First Amendment's protection of nude performances. *See FW/PBS, Inc. v. City of Dallas*, 110 S. Ct. 596, 604 (1990) (plurality recognized that "adult-only" establishments, including some with live non-obscene entertainment, have a valid First Amendment interest); *Massachusetts v. Oakes*, 109 S. Ct. 2633, 2642 (1989) (Brennan, J., Marshall, J. & Stevens, J., dissenting) (citing *Schad* for proposition that the First Amendment protects nude dancing and modeling); *Young v. Arkansas*, 474 U.S. 1070, 1072 (1986) (White, J. & Brennan, J., dissenting from denial of certiorari) (noting the Court's "repeated indications that barroom-type nude dancing is a type of expression that is protected under the First Amendment"); *New York State Liquor Authority v. Bellanca*, 452 U.S. at 718-19 (Stevens, J., dissenting) (noting that the Court had previously implied that "nude or partially nude dancing is a form of expressive activity protected by the First Amendment").

[8] *See, e.g., Jenkins v. Georgia*, 418 U.S. 153, 161 (1974) ("nudity alone is not enough to make material legally obscene under the *Miller* standards").

easily explains this Court's reluctance to declare that all nude dancing is absolutely protected.

To be sure, as petitioners suggest (P. Br. at 23), "indecent" speech in general and nudity in particular may be regulated in ways not permissible when political speech is involved. But that different treatment has been reflected only in this Court's solicitude for statutes designed to enable parents to determine whether children should have access to indecent material. The Court has sustained statutes barring the sale to children of material that does not satisfy the *Miller* standard, but that does satisfy the so-called variable obscenity standard, *i.e.*, it involves material that is obscene as to children. *See, e.g., Ginsberg v. New York*, 390 U.S. 629 (1968) (state can constitutionally restrict the dissemination of "girlie magazines" depicting nudity to minors). The Court has also sustained a regulation that allowed the "channelling" of indecent broadcast material to hours of the day when parents could exercise supervisory control over their children. *See FCC v. Pacifica Foundation*, 438 U.S. 726 (1978); *see also Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).[9]

This situation, however, is not present here. Respondents limit the access to their nude performances to adult patrons of their establishments in accordance with the statutory law of Indiana. *See* Ind. Code Ann. § 35-49-3-3 (West 1986) (making it an offense to "conduct[] a performance before minors that is harmful to minors"). And petitioners do not and cannot claim that the purpose of the Indiana statute here is to enable parents to decide what their children shall see and hear.

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[9] In *New York v. Ferber*, 458 U.S. 747, 756 (1982), this Court also upheld a ban on communications that involved so-called child pornography. But it did so only because of the state's acknowledged interest in preventing the exploitation of children during the production of such material, not because of the impact of the material on the recipients.

II. PETITIONERS CANNOT EVADE THE *MILLER* STANDARD BY SUGGESTING THAT RESPONDENTS' PERFORMANCES ARE NOT COMMUNICATIVE

Petitioners do not suggest that the indecency statute here serves a compelling state interest or that it constitutes the least restrictive alternative. Instead, they seek to evade the force of the *Miller* standard by urging that the nude dancing involved here—while not obscene—is not protected "communication" or that it can be banned without reference to standards of strict scrutiny.

Initially, petitioners and their *amici* argue that the statute is valid because it seeks to regulate conduct rather than speech. P. at 12-16; *Amici* Br. at 13-15. This is, of course, an entirely false dichotomy. Virtually all speech involves an indispensable element of conduct—ranging from the action of a soap-box speaker in the park who steps on his soap-box and gesticulates to the crowd to the newspaper publisher who must run his presses and dispatches his delivery trucks to carry his message to the general public. And this Court has consistently rejected the view that a regulation can escape strict scrutiny because the state characterizes it as a regulation of *conduct* rather than a regulation of *speech*. It is now well-settled that the First Amendment's protections "do[] not end at the spoken or written word" and that "*conduct* may be 'sufficiently imbued with elements of communication to fall within the scope of the First and Fourteenth Amendments.'" *Texas v. Johnson*, 109 S. Ct. at 2539 (emphasis added); *see United States v. Eichman*, 110 S. Ct. 2404, 2407 (1990). These decisions make abundantly clear that such "conduct—no differently than other sorts of expression—deserves First Amendment protection. The presence of a political message does not automatically immunize conduct from regulation; but, just as surely, the joining of speech and conduct does not remove the activity from the First Amendment's protection.

Nor can petitioners successfully argue that the performances here are unprotected because they "lack[] sufficient communicative elements to qualify as 'speech'" (P. Br. at 16) or because they merely "entertain" and convey an "emotional theme" (*id.* at 18). As petitioners appear to admit (P. Br. at 24), nude dancing communicates an unmistakable message—one of eroticism and human sensuality—that respondents' patrons plainly understand. That message is no less discernible from the stages of respondents' adult-only establishments than the non-verbal messages that ballet dancers convey to audiences from (perhaps more refined) stages, that actors in silent films convey to movie theater audiences, and that mimes convey to audiences from theater stages or make-shift platforms on city streets. No one would seriously question the artistic nature of these forms of non-verbal conduct or contend that the First Amendment affords them no protection. *See, e.g., Schacht v. United States*, 398 U.S. 58 (1970) (amateur street skit performed in protest of Vietnam conflict was a theatrical production protected under the First Amendment); *Joseph Burstyn, Inc. v. Wilson*, 343 U.S. 495 (1952) (motion pictures are protected speech).[10]

That respondents' nude dancing may be "crude and amateurish and perhaps unappealing" (*Schacht*, 398 U.S. at 61-62) to some individuals does not make it less deserving of First Amendment protection. Indeed, as Judge Posner aptly explained (Pet. App. at 17-18), erotic danc-

[10] Petitioners suggest, as Judge Easterbrook did (Pet. App. at 85-86), that respondent Miller's testimony that she was "just entertaining, just dancing" (P. Br. at 6, 16) negates the communicative element of the conduct. It does not do so. First, other respondent-dancers testified that they intended their conduct to communicate, as petitioners concede. P. Br. at 17. Second, that respondent Miller was "just entertaining, just dancing" does not make her conduct devoid of expression; as we explain (*see* discussion, *infra*, at 14), the First Amendment protects conduct that is "entertaining" as well as other forms of expression. Finally, as the majority correctly concluded (Pet. App. at 8, 11-12), nude dancing is inherently expressive; it communicates an unmistakable, emotive message of eroticism.

ing has ancient roots. *See* Cheshire, *Eroticism in the Performing Arts*, in Webb, THE EROTIC ARTS 297-306 (rev. ed. 1983). Its role in more contemporary public performances—for example, the Dance of the Seven Veils in Strauss's *Soleme* and the more controversial musicial *Hair* —only underscores the artistic quality of nude dancing. Though perhaps less refined and choreographed, for constitutional purposes respondents' nude performances are artistic performances just like these unquestionably artistic (albeit more mainstream) performances.

Petitioners' contention that nude dancing is not protected speech because it entertains, rather than informs, is untenable. P. Br. at 18-23. This Court has never conditioned First Amendment protection on a showing that the speech is politically informative. *See, e.g., Schad*, 452 U.S. at 65 (nude dancing); *Joseph Burstyn*, 343 U.S. at 501 ("sacrilegious" film). Nor has it conditioned protection on a showing that the speech is educational or uplifting in some traditional sense. *See Winters v. New York*, 333 U.S. 507 (1948) (magazines containing accounts of criminal deeds). Rather, this Court has made plain that "[e]ntertainment, as well as political and ideological speech, is protected." *Schad*, 452 U.S. at 65.[11] Respondents' entertainment—and the "emotive" message that it conveys—warrant that protection here.[12]

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[11] *See Joseph Burstyn*, 343 U.S. at 501 ("The importance of motion pictures as an organ of public opinion is not lessened by the fact that they are designed to entertain as well as to inform"), citing *Winters*, 333 U.S. at 507.

[12] This case is distinct from the ballroom dancing that this Court declined to protect under the First Amendment in *City of Dallas v. Stanglin*, 109 S. Ct. 1591 (1989). As the Court observed in *Stanglin*, where it upheld an ordinance restricting admission to dance halls to persons between ages 14 and 18, "the activity of these dance-hall patrons—coming together to engage in recreational dancing—is not protected by the First Amendment." *Id.* at 1595. This associational activity is quite distinct from the nude dancing that respondents performed on stage to communicate their message of eroticism to willing adult audiences.

III. THE *O'BRIEN* TEST IS INAPPLICABLE

Petitioners also suggest (P. Br. at 35) that, even if the performances here are protected by the First Amendment, Indiana's statute should be measured and sustained under the standard articulated by this Court in *United States v. O'Brien*, 391 U.S. 367 (1968). Petitioners urge that the statute is constitutional because it furthers substantial government interets "unrelated to the suppression of free expression." *Id.* at 377. Petitioners' argument is wholly lacking in merit.

The *O'Brien* test was specifically developed to address the difficult question presented by symbolic speech. *O'Brien* involved the prosecution of a person for burning his draft card to protest the Viet Nam war and the draft under a criminal statute prohibiting destruction of draft cards. This Court explained that "when 'speech' and 'nonspeech' elements are combined in the same course of conduct, a sufficiently important governmental interest in regulating the nonspeech element can justify incidental limitations on First Amendment freedoms." *Id.* at 376. But "the governmental interest [must be] unrelated to the suppression of free expression" and "the incidental restriction on alleged First Amendment freedoms [must be] no greater than is essential to the furtherance of that interest." *Id.* at 377. Thus, despite O'Brien's contention that he could not be punished for his political protest, the Court upheld the conviction because the substantial governmental interest in the "smooth and efficient functioning of the Selective Service System," *id.* at 382, was "limited to the noncommunicative aspect of O'Brien's conduct." *Id.* at 381-82.

Petitioners' analogy to *O'Brien* does not withstand analysis. While the government's interest in administratively tracking thousands of young men who might be called to serve in time of war may have been unrelated to the merits of O'Brien's political protest, Indiana's interest in public morality is directly concerned with the

erotic message conveyed by respondents' nude dancing. Despite petitioners' assertion that the statute's goals are unrelated to the suppression of speech (P. Br. at 36-37), it is evident that the State seeks to regulate the activity because of the message conveyed and for no other reason.[13] Unlike the governmental ban on both public and private draft card burning in *O'Brien*, Indiana does not in this statute seek to regulate nudity in private. *See O'Brien*, 391 U.S. at 375. It is simply *because* people may see the erotic message that Indiana seeks to prohibit public nudity.[14]

Obviously, Indiana seeks to bar these performances precisely because it dislikes the erotic message that the performances appear to convey—because the message communicated allegedly leads to immoral thoughts and behavior. In the State's view, nude dancing must be condemned because it "does nothing more than arouse sexual urges." P. Br. at 24. Drawing on Judge Coffey's dissenting opinion, petitioners speculate that the "public display of nudity naturally encourages activities which break down the family structure . . . [and] is damaging to society and citizens by degrading women as sex objects, encouraging prostitution, increasing sexual assaults, and attracting other criminal acivity." P. Br. at 36-37.

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[13] For example, the State does not suggest that any physical contact will occur between the customers and the dancers. Indeed, in the bookstore operated by Glen Theatre, Inc., the customers sat in booths with glass panels from which they viewed the performances (P. Br. at 5), as in *Schad*, 452 U.S. at 62.

[14] The line of cases upon which Judge Easterbrook relies (Pet. App. at 79-80) are distinguishable. In each case, the Court held that the conduct may be regulated because the governmental interest was not designed to suppress the speech. *See, e.g., United States v. Albertini*, 472 U.S. 675 (1985) (government interest in security on a military base was unrelated to demonstrators' political protest); *Council of Los Angeles v. Taxpayers for Vincent*, 466 U.S. 789 (1984) (city's esthetic interest in eliminating visual clutter by banning posters was manner restriction unrelated to suppression of speech).

There is no legislative history to demonstrate that the legislature actually considered these interests, and the record in this case is completely devoid of any evidence to support them.[15] The Seventh Circuit correctly held, based on the State's assertion at oral argument, that the State's interest is "the protection of public morality generally, and the family structure in particular" (Pet. App. at 14); it thus concluded that the public indecency law "directly restricts activity in the context of this case precisely because it expresses a particular message contrary to the legislature's prescribed vision." *Id.* n.7.[16] That such expressive consequences of conduct cannot be tested by the *O'Brien* standard was made clear most recently in *Eichman*, 110 S. Ct. at 2407, where this Court stated:

> the State's asserted interest "in preserving the flag as a symbol of nationhood and national unity," was an interest "related 'to the suppression of free expression' within the meaning of *O'Brien*" because the State's concern with protecting the flag's symbolic meaning is implicated "only when a person's treatment of the flag communicates some message."

In short, here, as in *Cohen*, 403 U.S. at 18, the only "'conduct' which the State sought to punish [was] the

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[15] *See Cohen v. California*, 403 U.S. 15, 23 (1971) (State's belief that four-letter word will inherently cause violent reaction reflects an "'undifferentiated fear or apprehension of disturbance [which] is not enough to overcome the right to freedom of expression'"), quoting *Tinker v. Des Moines Indep. Community School Dist.*, 393 U.S. 503, 508 (1969); *cf. Schad*, 452 U.S. at 72-73.

[16] *See Joseph Burstyn*, 343 U.S. at 504-05 (1952) (rejecting state's interest in the prevention of "sacrilegious" movies as "broad and all inclusive" justification by which the "censor is set adrift upon a boundless sea amid a myriad of conflicting currents of religious views, with no charts but those provided by the most vocal and powerful othodoxies"). It is precisely because the state's interest in protecting public morality is so expansive and indefinable, and sweeps into its net all types of speech, that such speculative justifications are consistently rejected.

fact of communication." Because the restriction on expression cannot be "'justified without reference to the content of the regulated speech'" (*Eichman*, 110 S. Ct. at 2409, citing *Boos v. Barry*, 485 U.S. 312, 320 (1980)), it cannot be tested under the *O'Brien* standard.[17] To allow a state to ban nude performances would, contrary to the First Amendment, prohibit expression merely because it is morally offensive to some members of society. *See Eichman*, 110 S. Ct. at 2410, quoting *Johnson*, 109 S. Ct. at 2544.[18]

IV. INDIANA'S PROHIBITION ON NUDE DANCING CANNOT BE JUSTIFIED BY ITS INTEREST IN REGULATING SECONDARY EFFECTS OF THE PROTECTED SPEECH

Petitioners also argue that, even if the regulation is addressed to the communicative elements of respondents' performances, the State properly has an interest in regulating "secondary effects" of nude barroom dancing (P. Br. at 39-40), apparently relying on *City of Renton v. Playtime Theatres, Inc.*, 475 U.S. 41 (1986), and *Young v. American Mini Theatres, Inc.*, 427 U.S. 50 (1976). It is difficult to believe that petitioners can seriously make such an argument.

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[17] *See Johnson*, 109 S. Ct. at 2542 ("outside of *O'Brien* test altogether"); *Spence v. Washington*, 418 U.S. 405, 414 n.8 ("four-step analysis of . . . *O'Brien* . . . is inapplicable").

[18] Petitioners further suggest that, even without complying with the *O'Brien* test, their prohibition of respondents' conduct is valid "regardless of its impact on expressive 'speech'" as a "content-neutral criminal prohibition" under *Employment Division v. Smith*, 110 S. Ct. 1595 (1990). P. Br. at 32-33. *Smith* cannot be made to stand for such a proposition. Initially, as discussed *infra* at 21-23, the prohibition in this case is *not* content-neutral. In addition, unlike this case, the ruling in *Smith* was specifically limited to cases involving "a free exercise [of religion] claim unconnected with any communicative activity." *Smith*, 110 S.Ct. at 1600. Finally, accepting petitioners' argument would effectively overrule this Court's holding in *O'Brien*.

In *Renton*, this Court upheld a local zoning ordinance that regulated the location of adult theatres "to preserve the quality of urban life . . . ." 475 U.S. at 50. The evidence considered by the Renton City Council established that the "location of adult theatres ha[d] a harmful effect on the area and contribute[d] to neighborhood blight . . . ." *Id.* at 51. The Court held that the zoning ordinance was not aimed at the speech inside the establishments, but was concerned only with the secondary effects resulting from the placement of the establishments in local neighborhoods. Moreover, because it did not operate as a complete ban on the theatres themselves, the ordinance did not eliminate an entire category of speech. *Id.* at 48.

Indiana's statute does not operate in such a limited fashion. First, Indiana's desire to protect public morality, *i.e.*, to prevent "sexual urges" that result from viewing nude dancing, is simply not a secondary effect unassociated with this type of speech. As the Court made clear in *Boos*, "[l]isteners' reactions to speech are not the type of 'secondary effects' [that the Supreme Court] referred to in *Renton*." 485 U.S. at 321. In *Boos*, this Court hypothesized:

> [I]f the ordinance [in *Renton*] was justified by the city's desire to prevent the psychological damage it felt was associated with viewing adult movies, then analysis of the measure as a content-based statute would have been appropriate. The hypothetical regulation targets the direct impact of a particular category of speech, not a secondary feature that happens to be associated with that type of speech.

Id. This "psychological damage" is indistinguishable from Indiana's distilled concept of "public morality." For constitutional purposes, neither concept is properly characterized as a "secondary effect" of the speech.

Second, Indiana's law is not a regulation at all. It is a prohibition and, as such, cannot be justified under this Court's secondary effects decisions. "The Renton ordinance, like the one in *American Mini Theatres*, d[id] not ban adult theaters altogether . . . ." *Renton*, 475 U.S. at 46. As this Court said in *Renton*, to close the door on a particular type of speech "presumptively violate[s] the First Amendment." *Id.* at 41. Indiana's statute plainly closes that door here; it bans all public nude dancing anywhere, anytime.

V. INDIANA'S PUBLIC INDECENCY STATUTE IS A CONTENT-BASED BLANKET BAN THAT CANNOT QUALIFY AS A TIME, PLACE AND MANNER RESTRICTION

Petitioners finally contend that the definition of nudity in Indiana's public indecency statute "is clearly a limitation on the *manner* in which the dance is performed" (P. Br. at 39) (emphasis in original), and thus falls within the time, place and manner standard for regulating otherwise protected expression under the First Amendment. *Id.* at 38-41. To avail itself of this standard, however, the State must demonstrate that its restriction is "justified without reference to the content of the regulated speech, [is] narrowly tailored to serve a significant governmental interest, and . . . leave[s] open ample alternative channels for communication of the information." *Clark v. Community for Creative Non-Violence*, 468 U.S. 288, 293 (1984). Just as petitioners failed to satisfy the *O'Brien* standard,[19] they failed to meet their burden of establishing that the indecency statute fits within the specific limits of this Court's "time, place and manner" standard.

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[19] *See Clark*, 468 U.S. at 298 ("the four-factor standard . . . for validating a regulation of expressive conduct . . . in the last analysis is little, if any, different from the standard applied to time, place, or manner restrictions").

A. Indiana's Public Indecency Statute Is Content-Based

Petitioners' attempt to characterize the statute as content-neutral is without support. Petitioners contend that "the history of the crime of public indecency is strong evidence that the statute was not intended to discriminate on the basis of viewpoint." P. Br. at 28. Petitioners also claim neutrality because the "statute by its own terms bans *all* nudity in public." *Id.* at 30 (emphasis in original). But the statute's viewpoint neutrality is superficial only, since petitioners make clear that Indiana plans to apply its nudity ban selectively, banning petitioners' performances but exempting higher art forms like ballet. *Id.* at 21.[20]

Even if Indiana's law were not "directly viewpoint-based," *Boos*, 485 U.S. at 319, that would "not render the statute content-neutral." *Id.* The First Amendment remains hostile to regulations that prohibit an entire category of speech and treats such regulations as content-based. *Id.* As applied, the Indiana statute completely bans an entire category of protected speech, *i.e.*, non-obscene, nude barroom dancing.

In determining content neutrality, "[t]he government's purpose is the controlling consideration." *Ward v. Rock Against Racism*, 109 S. Ct. 2746, 2754 (1989). Here, Indiana's public indecency law is content-based because it cannot be "'*justified* without reference to the content of

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[20] *See State v. Baysinger*, 272 Ind. 236, 397 N.E.2d 580, 587 (1979), *appeals dismissed sub nom. Clark v. Indiana*, 446 U.S. 931 (1980), and *Dove v. Indiana*, 449 U.S. 806 (1980) (court construed indecency statute "to allow some nudity as a part of some larger form of expression meriting protection, when the communication of ideas is involved"). While Indiana interprets the *Baysinger* holding to exempt nude dancing performed "in the course of a protected theater production" (P. Br. at 25), it is undisputed that state law "enforcement officials had arrested and prosecuted nude dancers [such as those involved here] under § 35-45-4-1, and would do so in the future." P. Br. at 4.

the regulated speech.'" *Ward*, 109 S. Ct. at 2754, quoting *Clark*, 468 U.S. at 293 (emphasis added in *Ward*). Indeed, the State justifies its suppression of nude dancing with reference to the particularized message of "eroticism and sensuality" (Pet. App. at 11); it cannot articulate a justification without expressing a viewpoint at odds with the erotic message conveyed. The State's purpose of protecting public morality is advanced only because the State believes that completely nude dancing conveys a more damaging or undesirable message than dancing while partially clad.

This Court's decisions in *Ward* and *Clark* do not, as petitioners suggest (P. Br. at 39), teach that such a prohibition is content-neutral. In *Ward*, this Court held that the city's sound-amplification guideline was content-neutral because the city's justifications—its "desire to control noise levels at Bandshell events . . . and to avoid undue intrusion into residential areas and other areas of the park" (*Ward*, 109 S. Ct. at 2754)—were unrelated to the content of the musicians' performances; the city did not "attempt to serve purely aesthetic goals by imposing subjective standards of acceptable sound mix on performers [that] would raise serious First Amendment concerns . . . ." *Id.* at 2754-55. So too, in *Clark*, this Court upheld a no camping regulation precluding homeless people from sleeping in symbolic tent cities as a reasonable manner restriction on their demonstration; the government's interest in maintaining attractive and accessible parks was unrelated to the demonstrators' political message (*id.* at 296, 299), and "it [was] not disputed . . . that the prohibition . . . [was] not being applied because of disagreement with the message presented." *Id.* at 295. In contrast to both *Ward* and *Clark*, the Indiana statute here runs directly contrary to this Court's " 'longstanding refusal to [punish speech] because the speech in question may have an adverse emotional impact on the audience.' " *Boos*, 485 U.S. at 322.

Contrary to petitioner's contention (P. Br. at 30), the fact that the statute may also prohibit non-communicative activities does not render it content-neutral. In *Johnson*, the Court invalidated a flag desecration statute even though it assumed that the statute was not limited "only to *expressive* conduct protected by the First Amendment" and that the statute might constitutionally be applied to such nonexpressive conduct. 109 S.Ct. at 2538 n. 3 (emphasis in original).

B. The Statute's Absolute Prohibition On Non-Obscene Nude Dancing Forecloses Any Adequate Alternative Avenues For the Communication

The Indiana statute also cannot qualify as a neutral time, place, and manner regulation because it forecloses any adequate alternatives for the communication. The suggestion that "[p]eople who seek this lifestyle are free to live in areas that cater to this moral climate" (Pet. App. at 51 (Coffey, J., dissenting))[21] has been rejected by this Court under strikingly similar circumstances. In *Schad*, 452 U.S. 61, a case notably absent from the brief of petitioners and their *amici*, this Court rejected the argument that because "live entertainment in general and nude dancing in particular are amply available in close-by areas outside the limits of the Borough" (*id.* at 76), adequate alternative channels of communication existed. This Court reiterated that " 'one is not to have the exercise of his liberty of expression in appropriate places abridged on the plea that it may be exercised in some other place.' " *Id.* at 76-77, quoting *Schneider v. New Jersey*, 308 U.S. 147, 163 (1939). *Schad* thus makes clear that Indiana cannot satisfy this element of the manner restriction by relying on nude dancing outside its borders.

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[21] Judge Coffey suggested that Indiana citizens who feel deprived should move to places "that tolerate[] and perhaps even welcome[] public nudity such as the likes of Las Vegas, San Francisco and others." Pet. App. at 51.

Nor can the Indiana statute be justified as a "manner" restriction merely because it only interferes with nude dancing by requiring that the dancers wear "pasties" and "g-strings," or on the theory that the message can still be conveyed in other ways. P. Br. at 40. This Court summarily rejected a similar argument in *Spence v. Washington*, 418 U.S. 405 (1974). There, the Court reversed a conviction for taping a removable peace symbol onto a flag displayed in an apartment window. Citing *Schneider*, *supra*, the Court refused to accept the state court's rationale that the "inhibition on [the] freedom of expression [was] 'miniscule and trifling' because there [were] 'thousands of other means available to [appellant] for the dissemination of his personal views . . . .'" *Id.* at 411 n.4 (citation omitted). That argument would permit the State to censor any performance, or indeed any literary work, by claiming that the message could be conveyed in a less direct and a more conventional manner. Applied throughout First Amendment jurisprudence, this notion would eviscerate freedom of expression because any idea could conceivably be expressed in some other manner. Prohibiting nude dancing entirely is thus not a mere restriction on the "manner" of speech; it is a regulation for which the time is forever, the place is the entire state, and the manner is a total ban on nudity.[22]

This is not to suggest that time, place and manner restrictions have no role in the regulation of public nudity. Contrary to petitioners' arguments (P. Br. at 40) and those of some of the dissenting judges below (Pet. App. at 97-98 (Easterbrook, J., dissenting); *id.* at 104 (Manion J., dissenting)), affirmance here will preserve Indiana's right to bar nude performances in the public streets and its ability to require that these performances be held

[22] Indiana itself must view the kind of erotic message that is conveyed by total nude dancing as more significant than the kind of erotic message that is conveyed by dancing with pasties and a g-string since it prohibits the former and permits the latter.

in places where audiences can be controlled, minors excluded and admission confined to those adults who seek to attend. Such restrictions, which may serve significant governmental interests, are entirely different from a blanket ban on nude dancing at all times and in all public places. *See* Pet. App. 14-15.

VI. SUSTAINING INDIANA'S BAN ON NUDE DANCING WOULD THREATEN FIRST AMENDMENT PROTECTIONS FOR OTHER FORMS OF NON-VERBAL EXPRESSION

Petitioners ask this Court to draw a dangerous line between conduct that is, and conduct that is not, protected speech. It is seemingly beyond question, even to petitioners (P. Br. at 22-25), that non-verbal conduct—like the dances in *Swan Lake* or *West Side Story* falling in the category of "high" art—deserves First Amendment protection; in fact, they begrudgingly concede that "[n]o doubt *some* dance is communicative" (*id.* at 21; emphasis in orignal). Though they insist that this case is not about drawing a line between "high art" and "low entertainment" (*id.* at 22-23), their own words—that "[a] nude 'ballet' dance on the bar at the Kitty Kat Lounge may not be protected, while a 'go-go' dance in the course of a protected theater production such as *Hair* and *Oh! Calcutta* might qualify as speech" (*id.* at 24-25)—prove the contrary.

The line that petitioners draw has no basis in the First Amendment.[23] If Indiana can ban nude performances on the stages of respondents' establishments, it and other states could as easily ban ethnic dancers—like

[23] Indeed, as evidenced by the current exhibition at The Museum of Modern Art entitled "High and Low: Modern Art and Popular Culture," this elusive line cannot be drawn even by thoughtful observers.

scantily-clad belly dancers in Morrocan restaurants or nude dancers in *Les Ballets Africains de Keita Fodeba* —from providing their cultural entertainment to willing audiences; it could likewise ban nude dances that are part of off-broadway, off-off-broadway or "alternative" productions; and it could—as petitioners claim they have the authority to do (Pet. App. at 45-46)—ban even movies with nude scenes. In short, if Indiana can prohibit any of these forms of artistic expression—merely because it finds some of these performances offensive—this country will have lost one of its most fundamental and cherished liberties.

It is no answer, and certainly no comfort to the *amici*, that nude dancers can supposedly communicate "any alleged 'erotic message' . . . just as effectively in scanty apparel as in total nudity." P. Br. at 40. This is yet another facile and unworkable distinction. Indiana now believes that pasties and a g-string promote its public morality goal without foreclosing erotic communication. But, if this Court adopts petitioners' rule, Indiana may next choose to promote that goal by requiring yet other pieces of clothing. It might further chill expression by requiring a dancer to wear a bikini or a leotard, or even bathrobes like those worn by the performers in the opening dance in *Oh! Calcutta.*[24] The First Amendment, however, prohibits such subjective and dangerous line-drawing based on the "inherently boundless" notion of "public morality." *Cohen*, 403 U.S. at 25. As Justice Harlan wrote in *Cohen*:

> [I]t is . . . often true that one man's vulgarity is another's lyric. Indeed, we think it is largely because

[24] As Judge Posner aptly states in his concurrence below, "it would violate the First Amendment to require museums to place figleaves and brassieres on their paintings and statutes. Perhaps the Indiana statute effects a parallel mutilation of striptease dancing." Pet. App. at 42 (Posner, J., concurring).

> governmental officials cannot make principled distinctions in this area that the Constitution leaves matters of taste and style so largely to the individual.

Id.

Banning respondents' nude dancing, based on such unprincipled distinctions, would thus have deep and long-lasting effects on the First Amendment. Nude dancing is non-verbal conduct, but speech nonetheless. It is communicative. It is artistic to some. And it is entertaining to those who choose to enjoy it. That some members of society find it non-communicative, non-artistic and offensively non-entertaining does not deprive it of First Amendment protection. Indeed, " '[i]f there is a bedrock principle underlying the First Amendment, it is that the Government may not prohibit the expression of an idea simply because society finds the idea offensive or disagreeable.' " *Eichman*, 110 S. Ct. at 2410, quoting *Johnson*, 109 S. Ct. at 2544. This Court should not depart from that fundamental principle here.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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